STATE OF MICHIGAN

COURT OF APPEALS

ADELAIDE DEVINE,

Plaintiff-Appellant,

v

RUBLOFF DEVELOPMENT GROUP, INC.,

Defendant-Appellee.

UNPUBLISHED
April 4, 2006

No. 259166
Kent Circuit Court
LC No. 03-011711-NO

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. By application of the open and obvious doctrine, and the evidence establishing a common and avoidable condition, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's grant of summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although the trial court did not state whether it granted defendant's motion under MCR 2.116(C)(8) or (10), its application of the open and obvious doctrine indicates that it considered evidence outside the pleadings. Therefore, we have reviewed its decision under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, *supra* at 120. The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties and evaluates the evidence in a light most favorable to the nonmoving party to determine if there is a genuine issue of fact for trial. *Maiden*, *supra* at 120; MCR 2.116(G)(6).

Under the open and obvious doctrine applied by the trial court, a premise possessor's duty generally does not include a duty to protect an invitee from open and obvious dangers, unless special aspects of the condition make the open and obvious risk unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). But in general, the particular duty owed by a premises possessor depends on whether the visitor is classified as a trespasser, licensee, or invitee. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004).

Although defendant argued below that plaintiff was a mere licensee, it does not advance that argument on appeal. We shall assume for purposes of our review that plaintiff was an invitee.

Plaintiff has inadequately briefed her claim that the trial court erred in finding that the allegedly dangerous condition was open and obvious. Indeed, although plaintiff characterizes the allegedly dangerous condition as the dumpster on the sidewalk, the trial court viewed the dangerous condition as ice and snow. Where an appellant gives only cursory treatment to an issue, with little or no citation to supporting authority, this Court may deem the issue abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In any event, the test to determine if a danger is open and obvious is whether an average user, with ordinary intelligence, would have been able to discover the risk that it presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002). Whatever danger was presented by the placement of the dumpster on the sidewalk in this case, we agree with defendant that it was not the cause of plaintiff's fall. Although the trial court failed to specifically rule on defendant's claim that plaintiff could not establish that the placement of the dumpster caused her fall, a party should not be punished for a trial court's failure to rule on an issue that was properly raised. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Causation is an essential element of a negligence action. *Kosmalski, supra* at 60. Causation encompasses two concepts, cause in fact and proximate cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." *Id.* at 87. But "where several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a 'substantial factor' in producing a plaintiff's injury." *Skinner v Square D Co*, 445 Mich 153, 165 n 8; 516 NW2d 475 (1994). Proximate cause generally involves an examination of the foreseeability of the consequences of the defendant's actions, and whether the defendant should be held legally responsible for such consequences. *Id.* at 163.

In *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001), our Supreme Court found that the plaintiff could not prove that a combination of ice and a defective sidewalk caused her to fall where she admitted slipping on ice present on the sidewalk and did not trip over or lose her balance in any way because of a claimed depression on the sidewalk. The sole proximate cause of the plaintiff's fall was determined to be the ice. *Id.* at 310. Although the instant case involves a dumpster on a sidewalk, plaintiff's deposition testimony indicated that the dumpster affected only the route that she took through the snow to reach the sidewalk across from the dollar store where she had been shopping.

We are satisfied that plaintiff did not meet her burden of establishing a genuine issue of material fact regarding whether the dumpster caused her fall. *Maiden, supra* at 120-121. Viewing the evidence in a light most favorable to plaintiff, the sole proximate cause of plaintiff's fall was ice and snow. Hence, the trial court properly treated the pertinent dangerous condition as the ice and snow, rather than the dumpster, when applying the open and obvious doctrine.

But it was unnecessary for the trial court to decide if plaintiff could pursue a negligence claim based on the hazard posed by ice and snow. The type of duty that arises from an accumulation of ice and snow is a duty to take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard. See *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 332; 683 NW2d 573 (2004). Here, the only breach of duties alleged in plaintiff's complaint pertained to the dumpster.

Regardless, plaintiff has not established that the slippery conditions at the shopping center were anything but open and obvious. Further, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm, if the risk is not avoided, will serve to remove a condition from the open and obvious danger doctrine. *Lugo, supra* at 519.

An invitee's inability to effectively avoid a condition may create a uniquely high likelihood of harm. *Lugo, supra* at 518; *Joyce, supra* at 242. In this case, however, plaintiff's deposition testimony indicated that a snowstorm was in progress, and that five to ten inches of snow were on the ground when her boyfriend dropper her off at the dollar store. Although it may be unreasonable to conclude that plaintiff could have avoided slippery conditions in light of the ongoing snowstorm, plaintiff could have limited her encounter with slippery conditions by arranging for her boyfriend to pick her up outside the entrance to the dollar store, rather than arrange to meet him at Target. Moreover, plaintiff could have avoided the entire encounter with ice and snow by not going to the shopping center during the snowstorm. The evidence, viewed in a light most favorable to plaintiff, established only a common and avoidable condition. Hence, even assuming that plaintiff's complaint sufficiently pleaded a negligence action arising from the ice and snow hazard, reversal is not warranted. The trial court reached the right result in granting defendant's motion for summary disposition.

In light of our decision, it is unnecessary to address defendant's alternative grounds for affirmance.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio